Supreme Court, U.S.
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No. 02-1580

IN THE

Supreme Court of the United States

RICHARD VIETH, ET AL.,

Appellants,

v.

ROBERT C. JUBELIRER, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF POLITICAL SCIENTISTS BERNARD GROFMAN AND GARY JACOBSON AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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August 2003

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INTEREST OF *AMICI CURIAE*[1]

Bernard Grofman is a specialist on redistricting and voting rights, with numerous books and articles on these topics. Gary Jacobson is a specialist on Congress and congressional elections, with numerous books and articles on these topics. Both are Professors of Political Science at the University of California, where each has taught for more than twenty years. Both are Fellows of the American Academy of Arts and Sciences.[2]

This *amicus* brief takes no position on the question of whether or not the congressional plan in Pennsylvania is an unconstitutional political gerrymander, nor even on the standards under which claims of partisan gerrymandering ought to be adjudicated. Rather, *amici* simply wish to bring to the Court's attention some important changes in American electoral politics, especially with regard to Congressional elections, that we believe directly bear on the issues currently before the Court. The evidence for the changes that we highlight is readily available in the public record (e.g., election results and patterns of roll-call voting in the U.S. House of Representatives), and we believe the evidence for the

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[1] Pursuant to Rule 37.3 of the Rules of this Court, all parties have consented to the filing of this brief and the parties' letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than the *amici curiae* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] A summary of the qualifications and affiliations of the respective *amici* is provided in the appendix to this brief. *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

phenomena to which we call attention is clear and compelling.[3]

SUMMARY OF ARGUMENT

Amici wish to alert the Court to the fact that the potential overall impact of partisan bias[4] attributable to redistricting has increased greatly in the last round of redistricting over what was found in earlier redistricting periods. This greater importance of redistricting bias stems from a combination of three factors.

The first factor is the nearly even partisan balance nationwide, which is reflected in the unusually close balance (by historical standards) between Republicans and Democrats in the U.S. House of Representatives.

The second factor is the small number of competitive seats in the U.S. House of Representatives left after the redistrictings that followed release of the 2000 Census data -- accentuating a trend that was already readily visible following the last several reapportionment cycles.

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[3] Our focus will be limited to the U.S. House of Representatives, but we would note that we believe similar statements about changes in the importance of redistricting could be made at the state level in a number of States.

[4] The concept of partisan bias is discussed in Bernard Grofman, William Koetzle, and Thomas Brunell, *An Integrated Perspective on the Three Potential Sources of Partisan Bias: Malapportionment, Turnout Differences, and the Geographic Distribution of Party Vote Shares*, 16 Electoral Studies 457-470 (1997). For the relationship between partisan bias and political gerrymandering, see Bernard N. Grofman, *Criteria for Redistricting: A Social Science Perspective*, 33 U.C.L.A. L. Rev., 77, 117-119 (1985). More general issues are discussed and competing points of view considered in Bernard N. Grofman (ed.), *Political Gerrymandering and the Courts* (New York: Agathon Press 1990).

The third factor is the dramatic rise in ideological polarization between the parties, which is reflected in voting patterns in Congress and in the congressional electorate nationwide.

Below we present evidence in support of each of our observations about partisan balance, district level competitiveness, and ideological polarization, comparing the situation in 2002 with what had been characteristic of previous redistricting eras, and then we explain how these factors have contributed to the increasing significance of partisan bias in redistricting.

ARGUMENT

THE POTENTIAL IMPACT OF PARTISAN BIAS IN REDISTRICTING HAS GREATLY INCREASED

1. Partisan Balance

The nearly even partisan balance nationwide is demonstrated, among other things, by the vote in the presidential election of 2000 and the near tie in the U.S. Senate over the past few years. As Figure 1 shows, the partisan balance in the U.S. House of Representatives became unusually close after 1994 and has remained so for a decade.

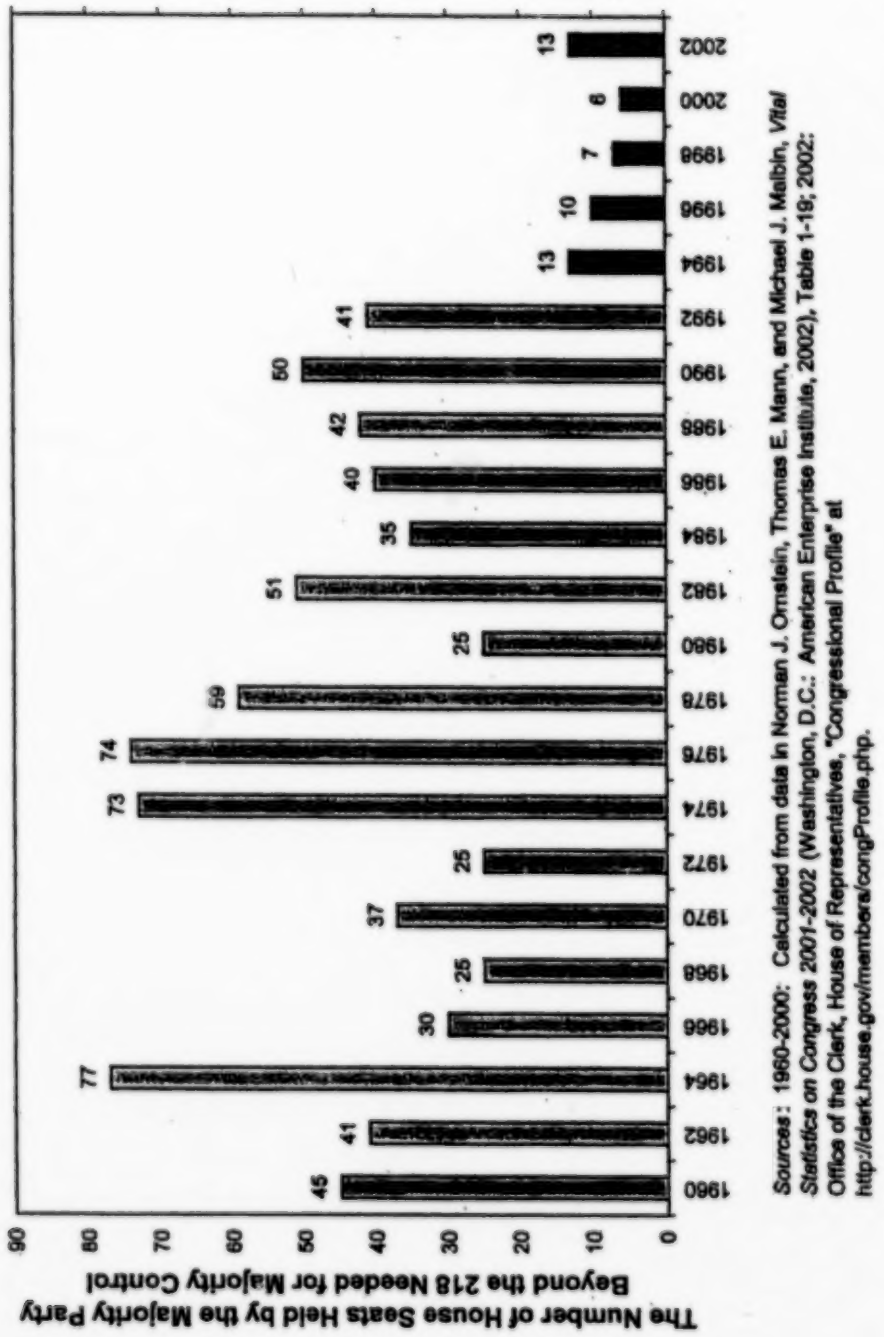

Figure 1. The Size of House Majorities, 1960-2002

Sources: 1960-2000: Calculated from data in Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress 2001-2002* (Washington, D.C.: American Enterprise Institute, 2002), Table 1-19; 2002: Office of the Clerk, House of Representatives, "Congressional Profile" at http://clerk.house.gov/members/congProfile.php.

2. District Level Competitiveness

Even while the overall partisan balance in the House has narrowed, the number of competitive House districts has tended to decline. Measured by the percentage of seats won either with less than 55 percent (Figure 2) or less than 60 percent (Figure 3) of the major party vote, the trend in the number of competitive seats has been downward since 1960. Figure 4, which displays a more subjective but perhaps more nuanced estimate of the level of competition in House races since 1980, supports the same conclusion.

Notice that years ending in "2," following wholesale reapportionment, have in the past tended to produce relatively large numbers of competitive seats (1972 is the exception). The low number of competitive districts in 2002 is thus all the more noteworthy, and if the pattern of declining competition after reapportionment observed in the 1960s, 1980s, and 1990s recurs, then competitiveness throughout the remainder of the decade will fall to record lows.[5]

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[5] *See also* Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 Political Science Quarterly 1, 9-10 (2003).

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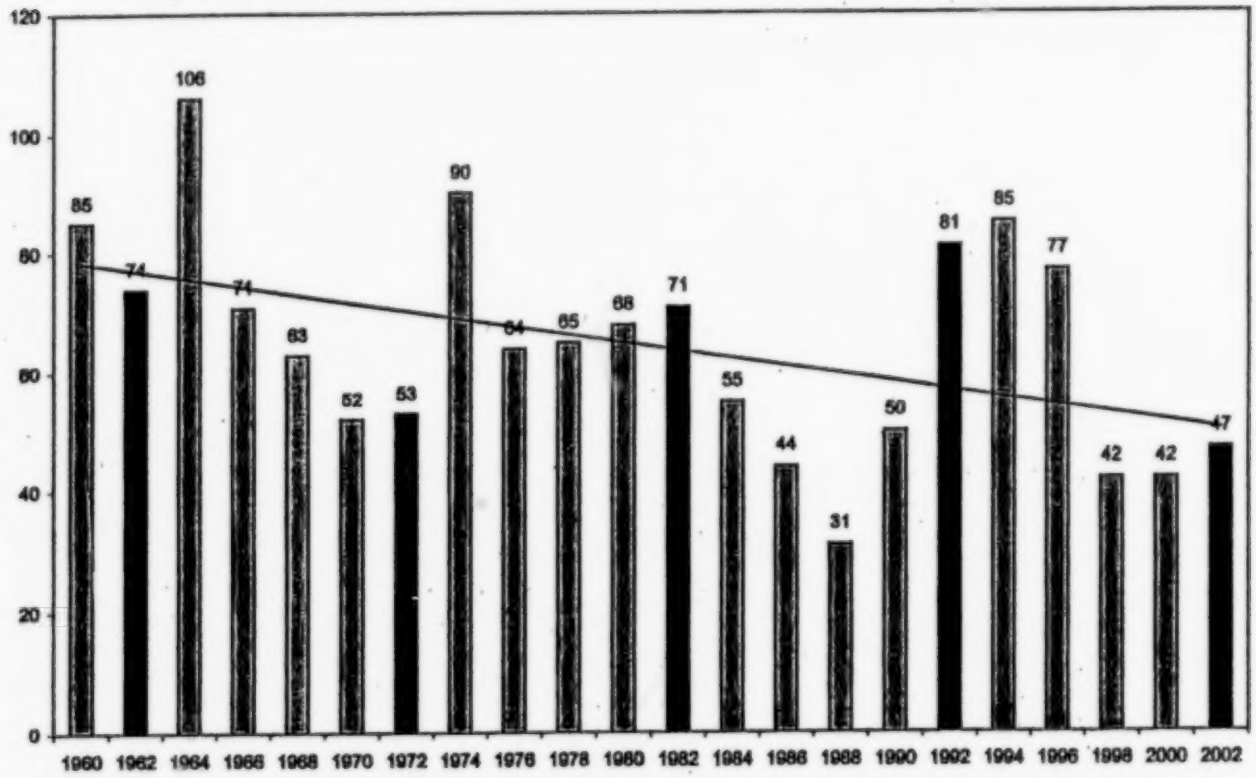
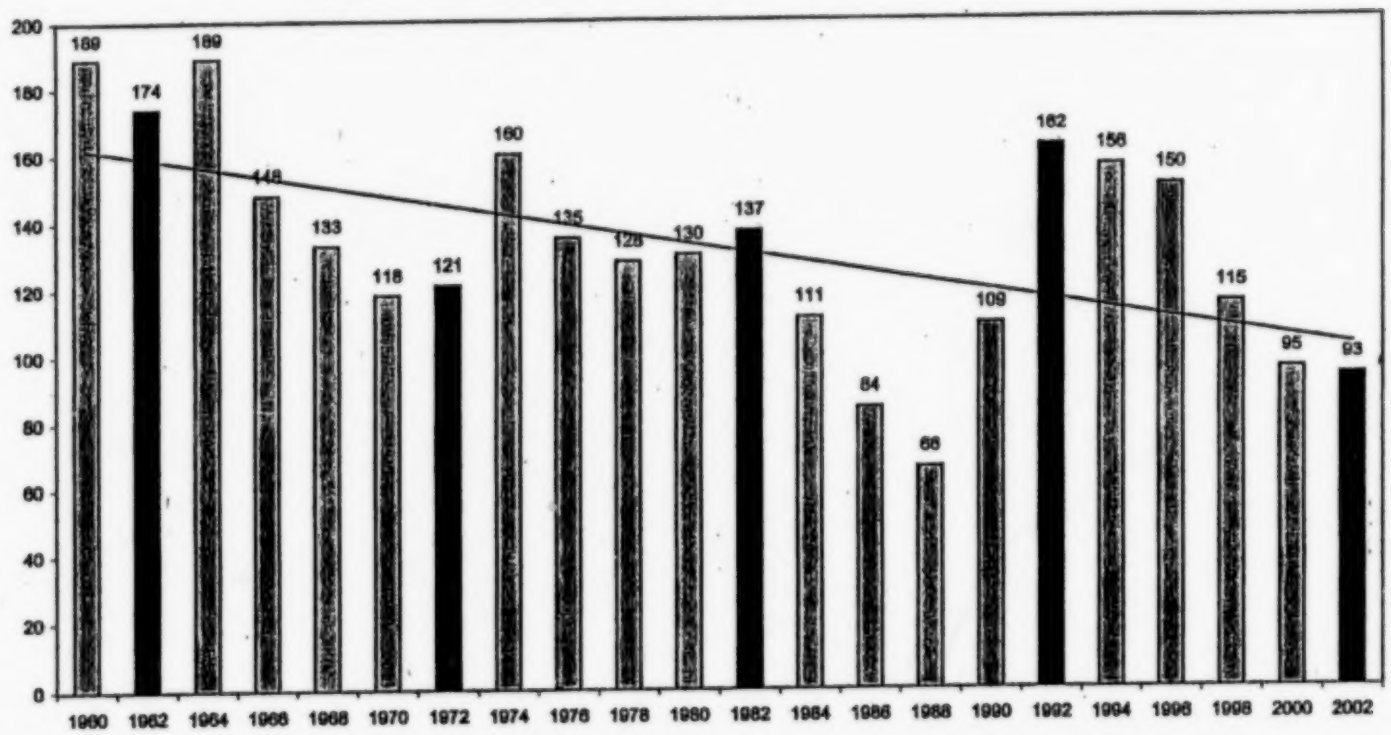
Figure 2. House Seats Won With Less than 55% of the Major Party Vote, 1960-2002



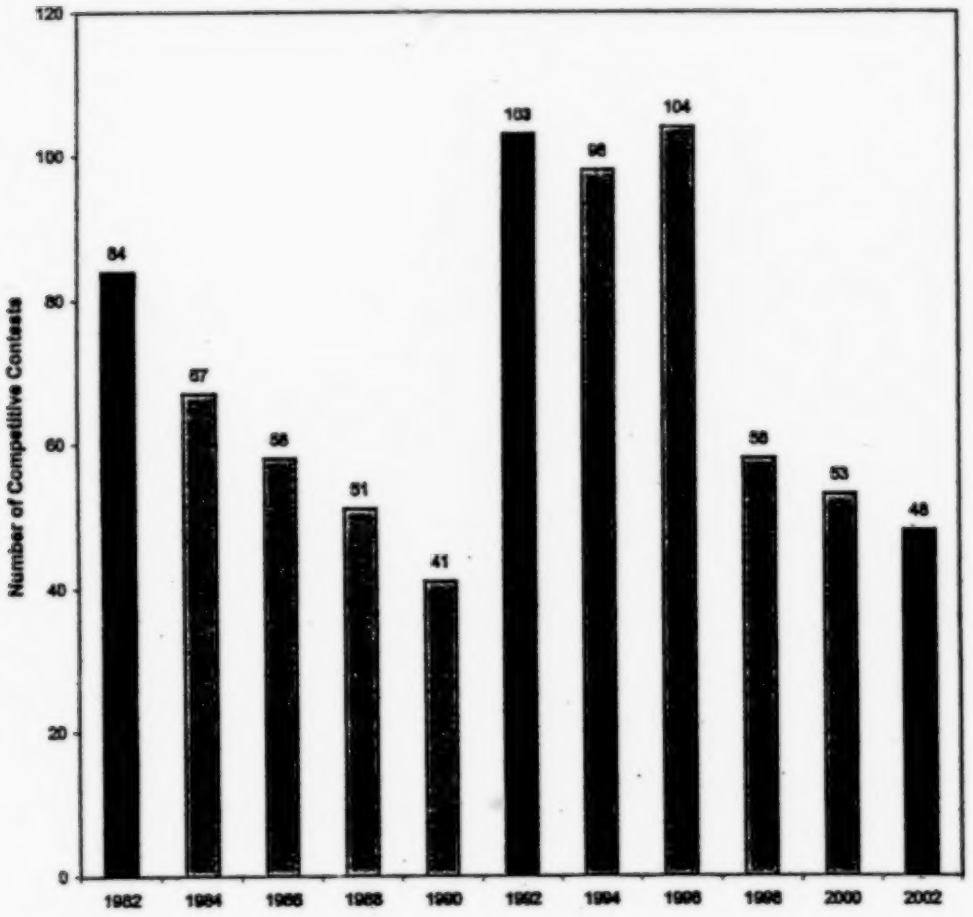
Sources: Compiled by Gary Jacobson from data in *Congressional Quarterly's Guide to U.S. Elections*, 2nd. Ed. (Washington, D.C.: Congressional Quarterly, 1985); Michael J. Dubin, *United States Congressional Elections, 1788-1997* (Jefferson, NC: MacFarland & Company, 1998); and U.S. Federal Election Commission, "Recent Election Results," at http://www.fec.gov/elections.html.

Figure 3. Seats Won with Less than 60 Percent of the Major Party Vote



Sources: Compiled by Gary Jacobson from data in *Congressional Quarterly's Guide to U.S. Elections*, 2nd. Ed. (Washington, D.C.: Congressional Quarterly, 1985); Michael J. Dubin, *United States Congressional Elections, 1788-1997* (Jefferson, NC: MacFarland & Company, 1998); and U.S. Federal Election Commission, "Recent Election Results," at http://www.fec.gov/elections.html.

Figure 4. Competitive House Elections, 1982-2002



Note: Competitive races are those classified by *Congressional Quarterly* as "tossups" or "leans Democratic (Republican); uncompetitive races are those classified as "safe" or "Democrat (Republican) favored."

Sources: *Congressional Quarterly Weekly Report*, 9 October 1982, 2481-2810; 13 October 1984, 2505-2509; 11 October 1986, 2399; 15 October 1988, 2879; 13 October 1990, 3279; 24 October 1992, 3356-3362; 22 October 1994, 3006-3010; 19 October 1996, 2965-2969; *CQ Weekly*, 24 October 1998, 2873; 21 October 2000, 2460; 26 October 2002, 2795.

3. Ideological Polarization

(a) Overall party polarization in the U.S. House of Representatives

The increasing partisan polarization of Congress is well documented. It is most clearly depicted in the Poole-Rosenthal DW-Nominate index, summarized in Figure 5. DW-Nominate scores are calculated from all non-unanimous roll call votes cast by House and Senate members; the score locates each member for each Congress on a liberal-conservative scale that ranges from –1.0 to 1.0; the higher the score, the more conservative the member. This is a standard and well-accepted measure of the ideological patterns of voting in the U.S. Congress.[6] On average, Democrats have become increasingly liberal since 1960, while the Republicans have become increasingly conservative. The result is that by the 106th Congress, ideological divisions between parties in the House and Senate were widest for the entire time period depicted and, indeed, according to the Poole-Rosenthal Index, wider than at any time since before World War I. The House party coalitions also became increasingly homogeneous, as shown by the decrease in the dispersion (the standard deviation) of scores around the party means. Figure 6 shows that the gap between the House party means grew from .49 to .86 on this 2-point scale over these decades.[7]

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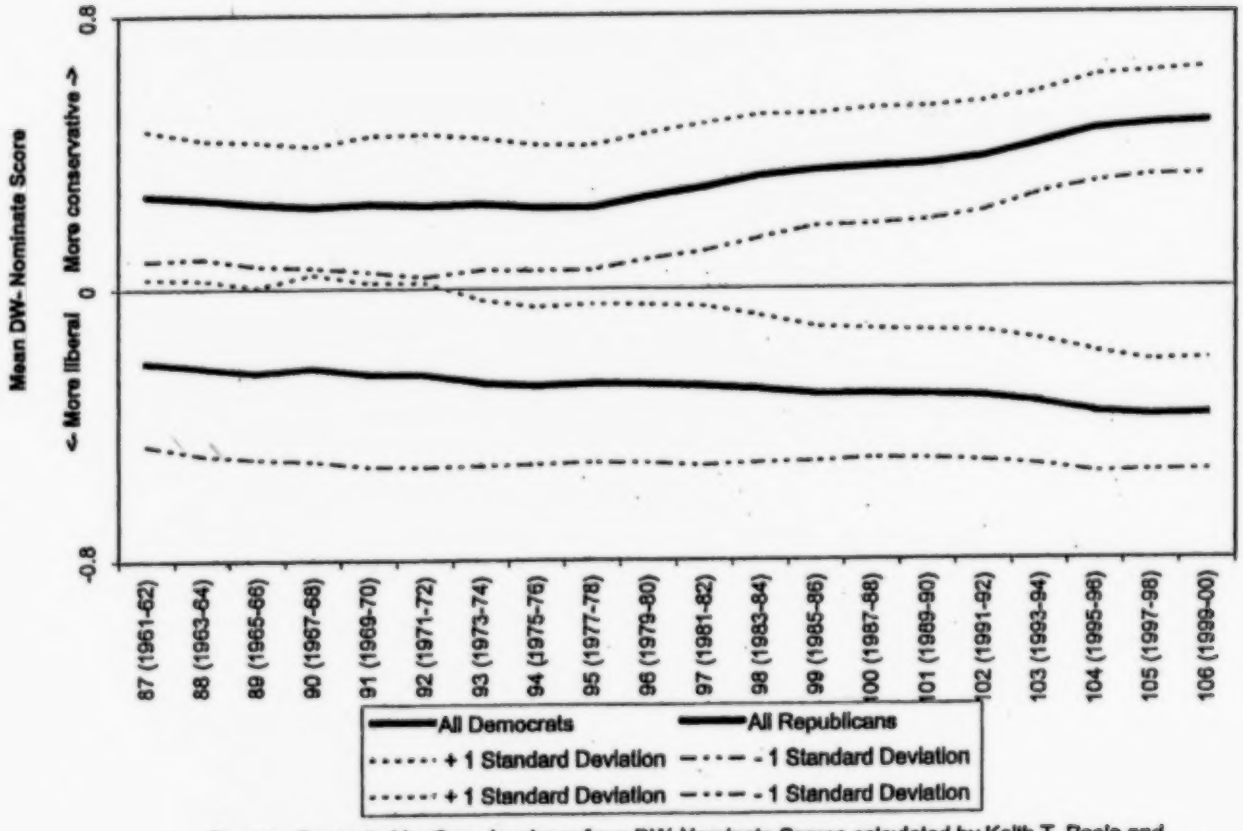
[6] Keith T. Poole and Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting* (New York: Oxford University Press, 1999), chs. 2-4 and Appendix A.

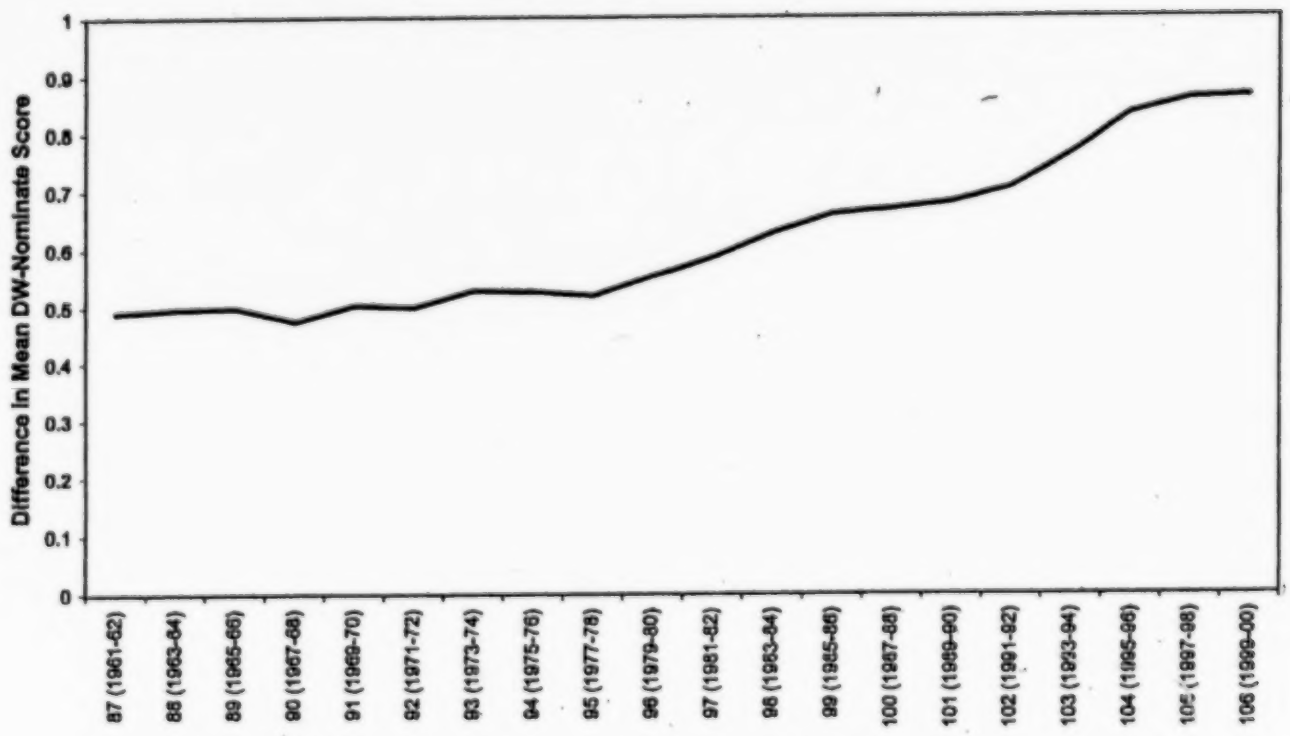
[7] For an alternative approach leading to essentially the same conclusion, see Bernard Grofman, William Koetzle, Samuel Merrill, and Thomas Brunell, *Changes in the Location of the Median Voter in the U.S. House of Representatives, 1963-1996*, 106 Public Choice 221-232 (2001).

Figure 5. Increasing Partisan Polarization and Homogeneity in the U.S. House



Source: Computed by Gary Jacobson from DW-Nominate Scores calculated by Keith T. Poole and Howard Rosenthal, available at http://voteview.uh.edu/default_nomdata.htm.

Figure 6. Ideological Difference Between the House Parties, 87th Through 106th Congresses



Source: Computed by Gary Jacobson from DW-Nominate Scores calculated by Keith T. Poole and Howard Rosenthal, available at http://voteview.uh.edu/default_nomdata.htm.

(b) Polarization of the partisan basis of electoral competition in the House

Another important electoral trend has been the increasing partisan polarization of the two House parties' electoral bases. This can be measured by using the district level vote for president as an indicator of district partisanship. Figure 7 displays the widening disparity in the electoral bases of House Republicans and Democrats since 1960.[8] Back in 1980, for example, the vote for Ronald Reagan was only 11.5 percentage points higher in districts won by Republicans than in districts won by Democrats. After a steep increase between 1992 and 2002, the difference is now nearly 20 percentage points. The redistricting that occurred after the 2000 census extended this trend. Increasing partisan polarization in Washington thus reflects the partisan polarization of House constituencies, which in turn is in part a consequence of redistricting.[9]

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[8] Figure 7 displays the difference in the presidential vote between districts that elected Republicans to the House and districts that elected Democrats. The data for non-presidential years are based on the vote in the previous presidential election two years earlier; where redistricting has occurred, the presidential vote has been reallocated to the new congressional districts. Reallocated presidential vote data were not available for the 1962 and 1966 districts, so these years are omitted.

[9] *See* Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 Political Science Quarterly 1, 9-10, 16-17 (2003).

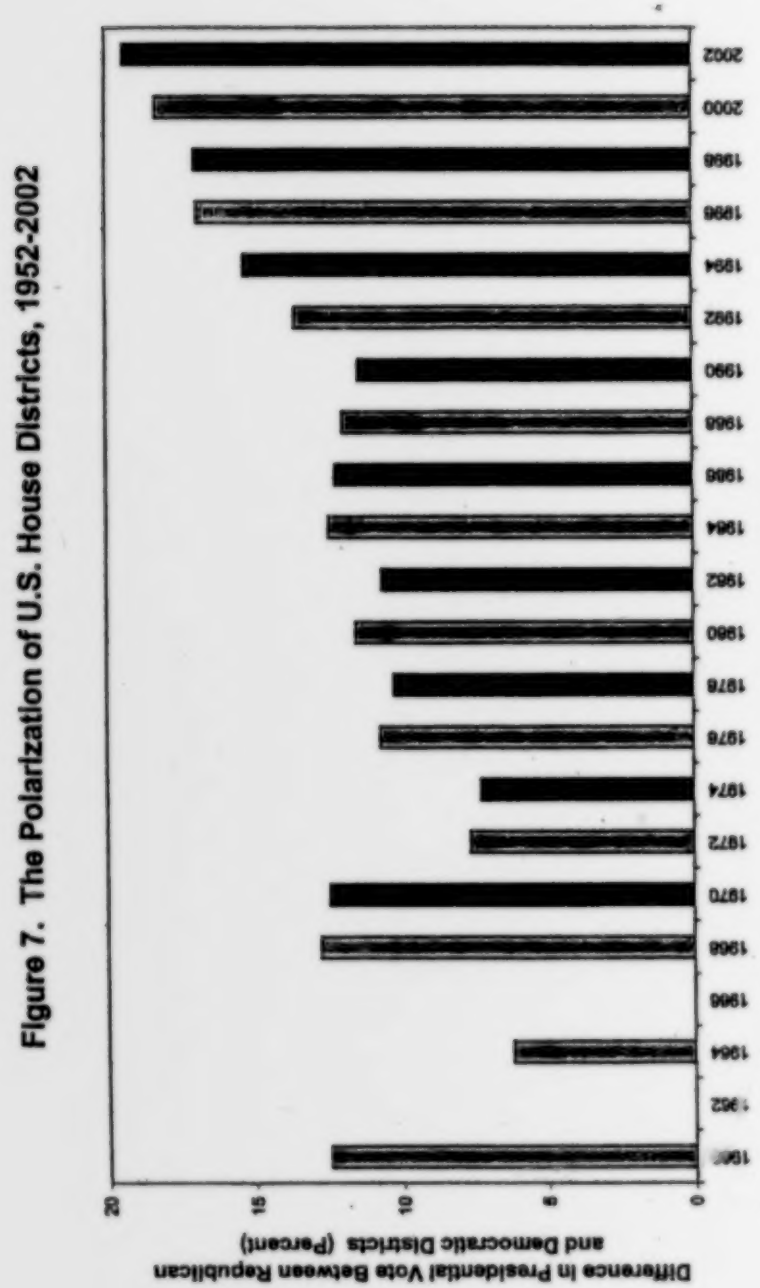

Figure 7. The Polarization of U.S. House Districts, 1952-2002

Note: Data for 1962 and 1966 are unavailable because of redistricting. In other midterms following reapportionments, the presidential vote from the previous presidential election has been recalculated for the new districts.

Source: Gary C. Jacobson, "Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections," *Political Science Quarterly* 118 (Spring, 2003), p. 17.

4. The Resulting Increasing Significance of Partisan Bias in Redistricting

A closely divided partisan balance and the absence of competitiveness at the district level mean that even a rather small partisan bias, even if no greater than what had been seen in previous decades, can now be determinative of which party controls the House over the course of a decade. If the partisan margin of control in the House were at the levels observed in the period from 1960 to 1990 (25 to 77; see Figure 1, above), then net nation-wide partisan redistricting effects on the order of 10 House seats or fewer might not matter that much. But, with the partisan balance in the House now so close, every seat counts.[10] Moreover, the long-run importance of a redistricting plan that affects only a handful of House seats is magnified by the fact that the "denominator" (those seats that might potentially change in partisan control over the course of a decade) is much smaller than it has ever been, i.e., House redistrictings after the 2000 Census left most House seats essentially non-competitive, and thus, effectively, "out of play" for the rest of the decade.

[10] The parties certainly act as if they believe this. For the 2000 round of redistricting, the national offices of both political parties developed extensive outreach campaigns to shape the state-level redistricting processes, with particular concern for affecting outcomes in the U.S House of Representatives. In 2003, for example, we have seen attempts to redraw lines for the U.S. House districts in Texas, a State in which partisan control of the redistricting process had shifted in 2002.

The dramatic rise in ideological polarization between the parties, which itself is to a significant extent the result of redistricting practices,[11] greatly increases the perceived stakes in control of Congress. The growing partisan rancor and decline in bipartisan compromise observed in Congress over the past decade means that the difference between a party's winning 49 percent and 51 percent of House seats is now vast. Given the absence of a "moderating center" in either party, the party that is in the minority is truly the "out" party, having little or no influence on outcomes. A minority party in the House can be effectively shut out of the political process.[12]

As a result of the close partisan balance, the dearth of competitive seats, the greater ideological polarization between the parties and the polarization of House constituencies, the drawing of House districts after the 2000 Census has had, and is likely to continue to have, a greater impact on partisan control of the U.S. House over the course of this decade than had earlier redistrictings.

[11] It is our view that the increased demographic and political homogeneity among districts -- changes related to redistricting practices developed since *Baker v. Carr*, 369 U.S. 186 (1962) -- has contributed substantially both to reduced competitiveness at the district level and to increased polarization in the House. Even if greater political homogeneity is merely a byproduct of a bipartisan gerrymander designed to protect incumbents, it can contribute to partisan polarization. Incumbents representing politically homogeneous constituencies need not appeal to independents or voters of the other party to win reelection and so are free to adopt relatively extreme ideological positions.

[12] If, on the basis of the districts as they have been configured, a party can reasonably expect to be in majority control of a legislature for the course of a decade, then almost certainly its leaders will be less inclined to engage in political compromise with members of the other party.

CONCLUSION

As the Court revisits the question of the conditions under which a partisan gerrymander rises to the level of a constitutional violation, *amici* respectfully urge the Court to bear in mind the important practical changes in American electoral politics that we have identified above.

Respectfully submitted,

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August 2003

APPENDIX

Bernard N. Grofman is Professor of Political Science at the University of California, Irvine, where he has taught since 1976. Much of his work has dealt with issues of elections and voting rules, voting rights, and redistricting. He is the author of more than 200 articles and research notes, co-author of *Minority Representation and the Quest for Voting Equality* (1992) and *A Unified Theory of Voting* (1999), and editor or co-editor of sixteen other books, including *Quiet Revolution in the South* (1995) (an empirical evaluation of the impact of the voting Rights Act on minority representation in municipal elections) and *Political Gerrymandering and the Courts* (1990). Professor Grofman was chair of the Section on Representation and Electoral Systems of the American Political Science Association in 1993-94. His work on voting rights has often been cited by federal courts, perhaps most notably in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Prof. Grofman's full curriculum vitae is available at http://hypatia.ss.uci.edu/ps/personnel/grofman/grofman.html.

Gary C. Jacobson is Professor of Political Science at the University of California, San Diego, where he has taught since 1979. He specializes in the study of U.S. elections, parties, interest groups, and Congress. He is the author of *Money in Congressional Elections* (1980), *The Politics of Congressional Elections* (5th ed., 2001), *The Electoral Origins of Divided Government* (1990), and co-author of *Strategy and Choice in Congressional Elections* (2nd ed., 1983) and The *Logic of American Politics* (2nd ed., 2003). He has served on the Board of Overseers of National Elections Studies (1985-93) and the Council of the American Political Science Association (1993-94). Prof. Jacobson's full curriculum vitae is available at http://polisci.ucsd.edu/faculty/jacobson.html.